CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

In re CHARLES RUSSELL RHINES, *Petitioner*

PETITION FOR A WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THE WEEK OF NOVEMBER 3, 2019

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Dated: November 1, 2019

QUESTION PRESENTED

CAPITAL CASE

Charles Rhines repeatedly has sought to prove that jurors who sentenced him to death relied on anti-gay prejudice in making their decision. This Court removed a barrier to the consideration of similar evidence of racial bias in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). After that decision, Mr. Rhines sought an evidentiary hearing in the state and federal courts on the basis of multiple jurors' statements reflecting stereotypes and animus aimed at his sexual orientation.

One juror who had voted for death stated that "we also knew that [Mr. Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison." A second juror indicated about deliberations: "One juror made . . . a comment that if he's gay, we'd be sending him where he wants to go if we voted for [life imprisonment without the possibility of parole]." And a third juror noted that there had been "lots of discussion of homosexuality" and "a lot of disgust."

No court has permitted a hearing to assess these statements or judged the constitutionality of Mr. Rhines's death sentence in light of them. The federal courts ruled that Mr. Rhines's attempt to obtain relief from judgment and amend his initial habeas corpus petition constituted an unauthorized "second or successive" petition for a writ of habeas corpus. Mr. Rhines has no avenue for relief, except in this Court, for his claims that the jurors' reliance on his sexual orientation in making their sentencing decision violated his due process and Eighth Amendment rights.

The question presented is:

> Should this Court exercise its original habeas jurisdiction to transfer this petition to the district court for a hearing regarding Petitioner's substantial evidence that at least one capital sentencing juror relied on anti-gay stereotypes and animus to sentence him death?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Charles Russell Rhines, was the movant before the United States Court of Appeals for the Eighthth Circuit. Mr. Rhines is a prisoner sentenced to death and in the custody of Darin Young, Warden of the South Dakota State Penitentiary.

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South Dakota v. Charles Rhines, South Dakota Supreme Court, Judgment Entered: May 15, 1996, published at 548 N.W.2d 415 (S.D. 1996)

Charles Rhines v. Douglas Weber, Seventh Judicial Circuit Court, County of Pennington, County of Pennington, Doc. 96-1070, Judgment Entered October 8, 1998.

Charles Rhines v. Douglas Weber, South Dakota Supreme Court, Doc. No. 2000 SD 19, Judgment entered: March 3, 2000.

Charles Rhines v. Douglas Weber, Seventh Judicial Circuit Court, County of Pennington, Doc. No. Civ. 02-924, Judgment entered March 25, 2013.

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South Dakota v. Charles Rhines, South Dakota Supreme Court, Doc No. 28460, Judgment Entered January 2, 2018.

South Dakota v. Charles Rhines, South Dakota Supreme Court, Doc No. 28444, Judgment Entered January 2, 2018.

Charles Rhines v. South Dakota Department of Corrections, et. al., Second Judicial Circuit Court, Minnehaha County, Doc. No. 49 CIV 18-002483, Judgment Entered: June 28, 2019.

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Charles Rhines v. Darin Young, U.S. Court of Appeals for the Eighth Circuit, Case No. 18-2376, Judgment Entered: October 25, 2019

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Charles Rhines respectfully requests that this Court transfer his petition for a writ of habeas corpus to the district court for hearing and determination of its merits, in accordance with 28 U.S.C. § 2241(b).

DECISIONS BELOW

The U.S. Court of Appeals for the Eighth Circuit declined to issue a certificate of appealability (COA) on September 7, 2018, in an unpublished order that appears in the Appendix at App. 1.[1] The Eighth Circuit denied a petition for panel rehearing on September 18, 2018, in an unpublished order that appears in the Appendix at App. 2.

Earlier, on January 2, 2018, the Supreme Court of South Dakota issued an unpublished order denying a motion for relief from the original judgment of sentence. App. 3-4. The May 15, 1996, direct appeal opinion of the Supreme Court of South Dakota is published at 548 N.W.2d 415 (S.D. 1996), and appears in the Appendix at App. 5-87. The original state-court judgment appears in the Appendix at App. 88-92.

JURISDICTION

Mr. Rhines invokes this Court's jurisdiction pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a), and Article III of the U.S. Constitution.

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[1] "App." refers to the appendix to this petition for habeas corpus.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution provides, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 United States Code § 2241(a) provides, in part: "Writs of habeas corpus may be granted by the Supreme Court." Section § 2241(b) provides: "The Supreme Court . . . may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it."

STATEMENT OF THE CASE

Charles Rhines began raising concerns about anti-gay bias at his capital trial even before trial began. Defense counsel unsuccessfully sought funds to retain a communications expert for help in addressing the issue during jury selection. Defense counsel also questioned potential jurors about whether they harbored any such bias.

During the guilt phase of trial, the State presented evidence that Mr. Rhines is gay. Jurors ultimately reached a guilty verdict and—when deciding whether to

sentence Mr. Rhines to life imprisonment without the possibility of parole or death—sent the trial judge a note with questions about life in prison. The note included questions about whether a prison would allow him to "mix with the general inmate population[,]" "create a group of followers or admirers[,]" "discuss, d[e]scribe or brag about his crime to other inmates, especially new and[/]or young men jailed for lesser crimes . . . [,]" "marry or have conjugal visits[,]" or "be jailed alone or . . . have a cellmate." App. 93-95.

In his direct appeal, Mr. Rhines unsuccessfully relied on the note to argue that anti-gay prejudice had influenced the jurors' sentencing decision.

Since 2015, Mr. Rhines has sought an opportunity to demonstrate juror bias through multiple jurors' statements. No court, however, has held an evidentiary hearing or determined whether he suffered a violation of his right to impartial jury sentencing.

Mr. Rhines has relied primarily on three statements. One juror stated: "[W]e also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison." App. 96. Another recalled a comment during deliberations "that if he's gay, we'd be sending him where he wants to go if we voted for [life imprisonment without the possibility of parole]." App. 97. And a third juror remembered "lots of discussion of homosexuality. There was a lot of disgust." App. 98 (declaration of Katherine Ensler, Federal Community Defender Office, quoting the third juror) (some quotation marks omitted).

I. Trial And Direct Appeal

In January 1993, Mr. Rhines stood trial in the Seventh Judicial Circuit Court of Pennington County, South Dakota, for the murder of Donnivan Schaeffer. Mr. Rhines filed a pretrial motion for authorization to retain a forensic communication expert to complete "a community attitude study and design a supplemental juror questionnaire . . . ." *See* App. 55. Counsel acted on a "concern[] that [Mr. Rhines's sexual orientation] would unfairly influence the jury, and . . . anticipated using the . . . survey and juror questionnaire to address this issue." App. 55. The trial court denied the motion. App. 55.

Mr. Rhines's lawyers asked all but one of the eventual jurors whether they would harbor bias against him because he is gay. App. 56. "Ten of the jurors expressed neutral feelings about homosexuality, indicating it would have no impact on their decision making." App. 56. One "stated that she regards homosexuality as sinful. However, she also stated Rhines'[s] sexual orientation would not affect how she decided the case. . . ." App. 56.

The State presented evidence of Mr. Rhines's sexual orientation during its case for guilt. One witness testified that she had seen Mr. Rhines "cuddling" with her husband and that Mr. Rhines had told her that he hated her because her husband loved her instead of Mr. Rhines. *See* Trial Tr., 1/19/93, at 2362, 2364. A former partner of Mr. Rhines also testified that they had a "sexual" relationship at one point in time. *See* Trial Tr., 1/19/1993, at 2292.

The jury found Mr. Rhines guilty of first-degree murder and third-degree burglary. App. 88-92. The State's case for a death sentence consisted of its guilt-phase evidence and victim-impact testimony. Trial Tr., 1/25-26/93, at 2585-91; Trial Tr., 1/25-26/93, at 2621-22. Mr. Rhines presented the testimony of his two sisters. Trial Tr., 1/25-26/93, at 2591-2620. One of his sisters testified that he is gay and "struggl[ed] with his sexual identity . . . ." Trial Tr., 1/25-26/93, at 2613-2617.

The jurors began deliberating at 4:10 pm on January 25. Trial Tr., 1/25-26/93, at 2697. On the morning of January 26, they sent the trial judge a note asking what would happen to Mr. Rhines if they sentenced him to life in prison:

> In order to award the proper punishment we need a clear p[er]spective on what "Life In Prison Without Parole" really means. We know what the Death Penalty means, but we have no clue as to the reality of Life Without Parole.
> The questions we have are as follows:
>
> 1. Will Mr. Rhines <u>ever</u> be placed in a minimum security prison or be given work release.
> 2. Will Mr. Rhines be allowed to mix with the general inmate population
> 3. [A]llowed to create a group of followers or admirers.
> 4. Will Mr. Rhines be allowed to discuss, d[e]scribe or brag about his crime to other inmates, especially new and[/]or young men jailed for lesser crimes (ex: Drugs, DWI, assault, etc.)
> 5. Will Mr. Rhines be allowed to marry or have conjugal visits.
> 6. Will he be allowed to attend college
> 7. Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex[:] TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment).
> 8. Will Mr. Rhines be jailed alone or will he have a cellmate.
> 9. What sort of free time will Mr. Rhines have (what would his daily routine be).
>
> We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternatives. On one

> hand there is Death, and on the other hand what is life in prison w/out parole.

App. 93-95. *See* Trial Tr., 1/25-26/93 at 2697-99.

The trial court instructed that "[a]ll the information I can give you is set forth in the jury instructions," Trial Tr., 1/25-26/93, at 2698, after declining to follow a defense request to instruct the jury not to base its "decision on speculation or guesswork," *Id.* At 2699. Roughly eight hours later, at 6:40 pm, the jury returned a sentence of death. *See Id.* at 2701-02.

The South Dakota Supreme Court affirmed. *See* App. 5-87. Among other claims, Mr. Rhines relied on the jury's note and argued that it had sentenced him to death under the influence of passion, prejudice, and other arbitrary factors. *See* App. 74-75. The court rejected all of his claims and concluded that the jury's note did not reflect anti-gay bias. *See* App. 74-75.

II. State And Federal Postconviction Proceedings Before This Court's Decision In *Pena-Rodriguez*

Mr. Rhines sought state and federal habeas relief through litigation that included review by this Court. *See Rhines v. Weber*, 544 U.S. 269 (2005); App. 99-115; App. 116-190; App. 161.

The federal district court denied relief on Mr. Rhines's petition in February 2016. *See* App. 162-210. The next month, Mr. Rhines filed a motion to alter or amend that judgment under Federal Rule of Civil Procedure 59(e) and included under seal two juror declarations. *See* App 211-250. The motion explained that, before April 2015, no attorney had attempted to speak with the jurors about their

note or any other aspect of the case. *See* App. 212. That filing specifically alleged that one juror had referred to Mr. Rhines as "'[t]hat SOB queer,'" App. 214, and that this reference made other jurors "'fairly uncomfortable,'" App. 214. The filing also quoted another juror's statements: "'One of the witnesses talked about how they walked in on Rhines . . . fondling a man in a motel room bed. I got the sense it was a sexual assault situation and not a relationship between the two men.'" App. 216. The juror also stated that, if sentenced to life imprisonment, Mr. Rhines might be "a 'sexual threat to other inmates and take advantage of other young men in or outside of prison.'" App. 216.

In April 2016, this Court granted a writ of certiorari in *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513 (2016), and Mr. Rhines requested that the district court hold his case in abeyance in light of that order, *see* Pet'r's Reply to Response to Mot. to Alter or Amend. Judgment, *Rhines v. Young*, No. 5:00-cv-05020-KES, ECF No. 340, PageID 5013–14 (D.S.D. filed Apr. 25, 2016). The district court, however, denied his Rule 59(e) motion in July 2016, without awaiting the decision in *Pena-Rodriguez* or hearing live testimony from any jurors. *See* App. 251-269. The court concluded that, "regardless of whether the juror affidavits are admissible," the motion failed to meet the requirements of Rule 59(e) and any claim of juror bias would be subject to procedural default. *See* App 258-259. Mr. Rhines filed a timely notice of appeal from the district court's judgment. *See Rhines v. Young*, No. 16-3360 (8th Cir. filed Aug. 3, 2016).

In December 2016, additional juror interviews provided further evidence for Mr. Rhines's suspicions of bias. As described above, a juror remembered that "[Mr. Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison." App. 96. Others remembered a similar comment during deliberations, *see* App. 97, and "lots of discussion of homosexuality. There was a lot of disgust." App. 98 (quoting the third juror) (some quotation marks omitted).

In Mr. Rhines's Eighth-Circuit appeal, he continued to assert that anti-gay bias had played an improper role in the jurors' deliberations. *See* Br. of Appellant, *Rhines v. Young*, No. 16-3360, 106 (8th Cir. filed Feb. 7, 2017) (citing the certiorari grant in *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513, in explaining that the jurors' note "reflected anti-gay bias and . . . concerns about Mr. Rhines's ability and opportunity to engage in same-sex sexual activity if sentenced to life").

III. State And Federal Postconviction Proceedings After This Court's Merits Decision In *Pena-Rodriguez*

This Court decided *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), in March 2017. Mr. Rhines sought to introduce the three statements quoted above in state court in November of that year, but the South Dakota Supreme Court ruled that "neither Appellant's legal theory (stereotypes or animus relating to sexual orientation) nor Appellant's threshold factual showing is sufficient to trigger the protections of *Pena-Rodriguez*," App. 4. This Court subsequently denied a petition for a writ of certiorari to the state supreme court in June 2018. *See Rhines v. South Dakota*, No. 17-8791, 2018 WL 2102800, at *1 (2018).

Mr. Rhines also sought relief from judgment and leave from the federal district court to amend his initial habeas petition with the jurors' statements to prove that anti-gay prejudice unconstitutionally had played a role in the jury's decision to sentence him to death. *See* App. 270-282; App. 283-306; *see also* App. 307-309 (giving notice to the Eighth Circuit of the motion to amend). His appeal from the denial of his initial habeas petition remained pending at the time.

The State opposed all of Mr. Rhines's requests and submitted an affidavit signed by an investigator in November 2017 that described interviews with nine jurors. *See* App. 310-316. Later, the State submitted another affidavit signed by the same investigator in December 2017 that described two additional interviews. *See* App. 317-319.

No juror whose statements led to the underlying motion retracted the earlier quoted statements that, for example, "we also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison," App. 96. The three jurors identified in Mr. Rhines's motion denied to the investigator that they had based their sentencing decision on his sexual orientation, *see* App. 310-316; App. 317-319, but two jurors confirmed that, during deliberations, a juror had "comment[ed] to the effect that [Mr.] Rhines might like life in the penitentiary among other men," App. 310-316; App. 317-319.

Specifically, the State's investigator reported that the third juror quoted above "recalled a comment to the effect that Rhines might like life in the penitentiary among other men." App. 310-316; App. 317-319. This juror opined to

the investigator that "the comment was made as 'somewhat of a tension release'" and also opined "that the foreman and everyone else on the jury agreed that Rhines was not on trial for being homosexual." App. 310-316; App. 317-319. *See also* App. 310-316; App. 317-319 (adding that "[t]he comment was just 'a one moment thing' which 'was never referred to again'"). The State's supplemental affidavit quoted this third juror as saying: "I don't care if he's queer or not, it didn't matter, the crime was committed as far as I'm concerned." App. 310-316; App. 317-319 (quotation marks omitted).

According to the State's investigator, the second juror quoted above also acknowledged that "one juror made a joke that Rhines might enjoy a life in prison where he would be among so many men." App. 310-316; App. 317-319. The second juror opined to the investigator that the statement and Mr. Rhines's sexual orientation had not impacted the jurors' ultimate decision, submitted a journal, and asserted that the "'stab at humor' 'did not go over well.'" *See* App. 310-316; App. 317-319; *see also* App. 310-316; App. 317-319 ("The juror who made the joke said that what he had said was stupid or dumb or something to that effect and 'that was the end of it.'").

The affidavit did not address the jurors' choice of language in their note to the trial judge about whether life imprisonment would allow Mr. Rhines, for example, to "mix with the general inmate population[,]" "create a group of followers or admirers[,]" "marry or have conjugal visits," or "discuss, d[e]scribe or brag about

his crime to other inmates, especially new and[/]or young men jailed for lesser crimes . . . [,]" App. 93-95.

The State's supplemental affidavit described an interview involving an investigator, an attorney for the State, the first juror, and that juror's wife, who said that her husband had problems with memory and dementia. App. 317-319. The juror reported that he had been honest during voir dire and denied that he had voted for death because Mr. Rhines is gay. App. 317-319. The affidavit also described the views and opinions of the juror's wife. App. 317-319.

The district court did not reach the merits of any claim or hold a hearing. Instead, it ruled that it lacked jurisdiction to consider Mr. Rhines's motion and that the motion amounted to a "second or successive" petition. *See* App. 320-343. Mr. Rhines applied for a COA from the Eighth Circuit. Two judges declined to issue one after noting that "[t]he district court denied relief on the ground that Rhines was seeking second or successive habeas relief that had not been authorized by the court of appeals." *See* App. 1 (citing 28 U.S.C. § 2244(b)(3)(A)). A third judge, however, "would [have] grant[ed] the certificate." App. 1. This Court later denied a petition for a writ of certiorari to the Eighth Circuit. *See Rhines v. South Dakota*, No. 17-8791 (June 18, 2018).

REASONS FOR GRANTING THE WRIT

This Court possesses the power "to entertain original habeas petitions," *Felker v. Turpin*, 518 U.S. 651, 658 (1996), and to "transfer[] the application for hearing and determination" to a district court, § 2241(b). In *In re Davis*, the Court

exercised that power because "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently 'exceptional' to warrant utilization of this Court's Rule 20.4(a), 28 U.S.C. § 2241(b), and [its] original habeas jurisdiction." 557 U.S. 952, 952 (2009) (Stevens, J., concurring). In the same way, the substantial risk of executing a man whose death sentence was based on his sexual orientation, and jurors' pernicious stereotypes about how a gay man would view a lifetime in prison, justifies the exercise of that power and an evidentiary hearing.

Mr. Rhines meets all the criteria for the issuance of an extraordinary writ. A petitioner seeking one must demonstrate "that adequate relief cannot be obtained in any other form or from any other court," "that exceptional circumstances warrant the exercise of the Court's discretionary powers," and "that the writ will be in aid of the Court's appellate jurisdiction." *Id.* The Court's "authority to grant habeas relief to state prisoners is limited by § 2254." *Felker*, 518 U.S. at 662. In addition, "[w]hether or not" the provisions governing "second or successive" petitions in § 2244(b) bind the Court, they "certainly inform [its] consideration of original habeas petitions." *Id.* at 662–63. Because Mr. Rhines meets the requirements, this Court should transfer this application for hearing and determination in the district court.

Without an exercise of this Court's discretionary powers, the State will execute a man without any federal court deciding an issue that implicates fundamental principles in the law: whether jurors who sentenced a man to death

relied on his sexual orientation and longstanding, but deeply disturbing, stereotypes about how a gay man would experience imprisonment in making their decision.

I. Mr. Rhines cannot obtain adequate relief, except from this Court. Procedural obstacles have prevented Mr. Rhines from obtaining relief in other forums.

Mr. Rhines has attempted, without success, to obtain relief for the violation of his rights from the courts below. *See* 28 U.S.C. § 2242; Rule of the Supreme Court 20.4 (requiring petitioner to "state the reasons for not making application to the district court"). Both the district court and the Eighth Circuit have applied § 2244(b) to bar consideration of Mr. Rhines's evidence and constitutional claims. *See* App. 1; App. 320-343. The lower courts reached that decision in spite of Mr. Rhines's efforts to seek relief after this Court had decided *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), but before he had completed appellate proceedings arising from the district court's denial of his initial federal habeas petition. App. 162-210.

Mr. Rhines has satisfied the exhaustion-of-state-remedies requirement. He unsuccessfully sought relief from judgment in the South Dakota Supreme Court, reconsideration of that court's prior review of the death sentence, and a hearing. *See* App. 3-4. No other remedies are available. *See* S.D. Codified Laws § 21-27-3.3 ("A two-year statute of limitation applies to all applications for relief under this chapter."); *O'Sullivan v. Boerckel*, 526 U.S. 838, 847–48 (1999) (discussing application of law of exhaustion vis-à-vis "available" procedures under State law, and exhaustion's relationship to procedural default).

The Governor of South Dakota has not exercised her powers to grant Mr. Rhines executive clemency.

Mr. Rhines cannot obtain "adequate relief . . . in any other form or from any other court." Sup. Ct. R. 20.4(a).

II. This case presents exceptional factual and legal circumstances.

To execute a man after one or more jurors voted for death on the basis of stereotypes and animus aimed at one of his immutable characteristics—his sexual orientation—unquestionably would violate the Sixth, Eighth, and Fourteenth Amendments, along with the foundational principle that "[o]ur law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle," *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (applying the Sixth Amendment guarantee of effective assistance of counsel when an attorney injected race-based testimony into a jury's sentencing determination).

Pernicious stereotypes about how a gay man would experience imprisonment in this country should have no place in the criminal law, let alone in a capital sentencing determination.

The only question for this Court is whether it should use its power to order a hearing on whether such a violation of constitutional law and foundational principles occurred and, now, will result in a petitioner's execution, or whether it will sidestep that decision on procedural grounds.

A. Jurors' statements reflect anti-gay prejudice directed at Mr. Rhines and a stereotype about how he, as a gay man, would experience life in prison without the possibility of parole.

The statements Mr. Rhines obtained during federal habeas proceedings, if credited, along with the jury's note during sentencing deliberations, demonstrate that the State obtained a death sentence on the basis of stereotypes and animus aimed at Mr. Rhines's sexual orientation. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (citing expert recognition "that sexual orientation is both a normal expression of human sexuality and immutable").

Jurors have attempted to characterize their statements as poorly chosen jokes and to deny their effect on the deliberations, but this Court should reject such attempts or, at least, require that they be addressed after a full and fair hearing. As the Eleventh Circuit explained in a similar context: "[A]nti-Semitic 'humor' is by its very nature an expression of prejudice on the part of the maker. . . ." *United States v. Heller*, 785 F.2d 1524, 1527–28 (11th Cir. 1986). Moreover, "[i]t is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism." *Id.* (footnote omitted).[2]

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[2] Courts assess whether improper bias arose even when jurors do not expressly recognize or admit that they harbor such bias. *See, e.g.*, *Murphy v. Florida,* 421 U.S. 794, 800–03 (1975); *Smith v. Phillips*, 455 U.S. 209, 221–23 (1982) (O'Connor, J., concurring). Rather, assessing the role of bias involves factual determinations. *See Phillips*, 455 U.S. at 215; *see also Wellons v. Hall,* 558 U.S. 220, 221–26 (2010) (per curiam) (granting a petition for a writ of certiorari, vacating a judgment in light of an erroneous ruling on procedural default, and remanding to

In addition, jurors' statements in this case evidence a clear and disturbing nexus between intolerable bias and the choice of a death sentence to, in one juror's words, keep Mr. Rhines from "life with men in prison" or, as another commented with regard to his sexual orientation, from "where he wants to go." *Compare* App. 96-98, *and Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam) (reversing a COA decision, in part, because "[a juror's] remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that [the petitioner]'s race affected [the juror]'s vote for a death verdict"), *with Tharpe*, 138 S. Ct. at 553 (Thomas, J., dissenting) (noting in dissent that jurors "testified that they did not consider race and that race was not discussed during their deliberations").[3]

These factual circumstances are exceptional.

B. The constitutional issues that arose from the jurors' decision are exceptional.

The jurors' reliance on Mr. Rhines's sexual orientation in imposing sentence flagrantly violated his constitutional rights to an impartial capital sentencing jury and to not be punished for his sexual orientation or private consensual sexual conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, police officers arrested the petitioners for engaging in intimate sexual conduct that the officers

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consider whether a petitioner would be entitled to discovery and a hearing regarding claims of juror and court bias and misconduct).

[3] On remand, the Eleventh Circuit again denied a COA to Mr. Tharpe. *See Tharpe v. Warden*, 898 F.3d 1342, 1344 (11th Cir. 2018). This Court subsequently denied a petition for a writ of certiorari to the Eleventh Circuit. *See Tharpe v. Ford*, 139 S. Ct. 911 (2019).

observed after entering Lawrence's apartment. 539 U.S. at 562-63. A state court convicted both petitioners under a statute that criminalized "deviate sexual intercourse" with a member of the same sex. *Id.* This Court recognized that the statute addressed more than "simply the right to engage in certain sexual conduct"; such a "statute[] do[es] seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Id.* at 567. "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* at 575; *see also id.* at 581 (O'Connor, J., concurring in the judgment) ("[T]he effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.").

The Court held that the petitioners' convictions violated their right to due process of law:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct with intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Id. at 578.

Mr. Rhines, likewise, should not suffer the ultimate punishment at the hands of jurors who weighed his private sexual conduct in their sentencing decision. His

execution would further no legitimate state interest that could justify that intrusion into his personal and private life.

Moreover, allowing Mr. Rhines's execution on the basis of a sentence imposed by biased jurors would independently violate his rights to an impartial jury, as this Court has repeatedly recognized. *See Smith v. Phillips*, 455 U.S. 209, 215-16 (1982).[4]

C. Previously binding interpretations of the Rules of Evidence and the lower federal courts' procedural rulings have denied Mr. Rhines a "meaningful avenue to avoid a manifest injustice."[5]

Mr. Rhines repeatedly attempted to prove that jurors relied on anti-gay stereotypes and animus in sentencing him to death. Until *Pena-Rodriguez*, however, their statements were inadmissible under either the Federal Rules of Evidence or South Dakota's rules, both of which provide:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Fed. R. Evid. 606(b)(1); *see* S.D. Codified Laws § 19-19-606(b)(1) (same).

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[4] *See also* U.S. Dep't of Just., Just. Manual No. 9-27.745, Unreasonable or Illegal Sentences (last updated Feb. 2018) ("The attorney for the government should oppose attempts by the court to impose any sentence that is: . . . (5) based on a prohibited factor, such as race, religion, gender, ethnicity, national origin, *sexual orientation*, or political association, activities, or beliefs." (emphasis added)).

[5] *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Pena-Rodriguez arose "at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system." 137 S. Ct. at 868. Two jurors came forward to state that a third juror, during deliberations on guilt in a noncapital case, "had expressed anti-Hispanic bias toward [a] petitioner and [the] petitioner's alibi witness." *Id.* at 861. The Court held:

> where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule [under a state rule of evidence] give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 869. It distinguished instances of juror "drug and alcohol abuse" and "pro-defendant bias," *id.* at 868, by stressing the "systemic injury to the administration of justice" that would be risked if juror-based racial discrimination were "left unaddressed," *id.*

Anti-gay bias, if left unaddressed in this case, risks systemic harm to the justice system and, in particular, capital jury sentencing. Indeed, the Government of the United States conceded during oral argument for *Pena-Rodriguez* that "capital cases do present Eighth Amendment considerations . . . . The Court has often suggested under the Eighth Amendment different sets of rules apply, and there may be different considerations in that context," *Pena-Rodriguez*, No. 15-606, Tr. of Oral Arg. 51 (Oct. 11, 2016).

Mr. Rhines presented the jurors' statements and requested a hearing after *Pena-Rodriguez* in a motion for relief from judgment and to amend his initial federal habeas petition while an initial denial of that petition was pending on

appeal. The lower courts, however, decided that they lacked jurisdiction to consider the motion, citing 28 U.S.C. § 2244(b).

Thus, because of Rule 606(b) and the lower courts' application of § 2244(b), Mr. Rhines has been denied a meaningful opportunity to be heard on the Sixth, Eighth, and Fourteenth Amendment claims founded on his sentencing jurors' extraordinary statements.

III. The requirements of § 2244(b) inform this Court's review and do not stand in the way of ordering a hearing.

Section 2244(b)(2)(A) permits courts to hear "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application" when certain conditions are met, including when "the applicant shows that the claim *relies on a new rule of constitutional law*, made retroactive to cases on collateral review by the Supreme Court, *that was previously unavailable*." (emphases added). "Whether or not" the provisions governing "second or successive" petitions in § 2244(b) bind the Court here, they "certainly inform [its] consideration of original habeas petitions." *Felker*, 518 U.S. at 662–63. Yet, the Circuits are split on the meaning of "previously unavailable" in § 2244(b) in analogous circumstances.

A. The Circuits are split on the meaning of "previously unavailable" in § 2244(b).

The Fifth Circuit recognizes that a petitioner can make a prima-facie showing for § 2244(b)(2)(A) purposes by relying on a retroactively applicable rule of constitutional law after both (i) this Court has announced such a retroactively

applicable rule and (ii) a change in legal and factual circumstances makes the rule newly available to that particular petitioner.

For instance, two petitioners initially filed applications for state and federal habeas relief after this Court had decided *Atkins v. Virginia*, 536 U.S. 304 (2002), itself "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." *See In re Johnson*, 935 F.3d 284, 292–93 (5th Cir. 2019); *In re Cathey*, 857 F.3d 221, 237–38 (5th Cir. 2017). Yet, at the time of their initial habeas filings, neither petitioner could present an *Atkins* claim "with some possibility of merit," because of the particular legal and factual circumstances of his case. *See Johnson*, 935 F.3d at 292–93 (quoting *Cathey*, 857 F.3d at 232–33, 237–38). The first petitioner lacked (1) documentation of a prison-administered IQ test resulting in a score of 73, (2) judicial recognition "as viable a theory called the Flynn Effect which supported that IQ scores could be inflated for certain reasons," and (3) the benefit of this Court's decision in *Hall v. Florida*, 572 U.S. 701, 723 (2014). *See Cathey*, 857 F.3d at 227–38. And the second petitioner lacked a new manual for psychiatric diagnoses, the DSM-5. *See Johnson*, 935 F.3d at 293 ("The previous diagnostic manual, in effect when Johnson filed his initial federal habeas petition, did not classify Johnson as intellectually disabled because of his IQ.").

"[A] claim must have some possibility of merit to be considered available." *Cathey*, 857 F.3d at 232. In turn, the Fifth Circuit "precedentially determined that it is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*."

Johnson, 935 F.3d at 294. Thus, petitioners in both cases made the requisite "showing that *Atkins* was previously unavailable as required by Section 2244(b)(2)(A)" to proceed. *Johnson*, 935 F.3d at 293.

The Eleventh Circuit, however, has rejected the Fifth Circuit's approach. Rather than follow the Fifth Circuit's logical progression through each requirement of § 2244(b)(2)(A), the Eleventh Circuit stated that "[*Cathey* and *Johnson*] are not retroactively applicable decisions of the Supreme Court, which is what the AEDPA requires." *In re Bowles*, 935 F.3d 1210, 1217 (11th Cir. 2019) (citing § 2244(b)(2)(A)). Judge Martin, however, would have followed the Fifth Circuit's approach. *See id.* at 1226 (Martin, J., concurring) ("Our Court has not recognized such an exception. However, we could have, and I would have done so here.").

Before *Pena-Rodriguez* first established the admissibility of evidence of juror bias during deliberations, Mr. Rhines's instant claims had no possibility of success. This case thus presents an opportunity to address this Circuit split, which implicates cases that rely on a variety of rules, as illustrated below.

B. Mr. Rhines "relies on" *Lawrence v. Texas* and *Romer v. Evans* to argue that this Court should not tolerate the use of a man's sexual orientation or same-sex sexual conduct to justify enhanced punishment, in this case, death. After *Pena-Rodriguez*, this Court should order an evidentiary hearing.

Mr. Rhines satisfies § 2244(b)(2)(A), because he relies on new rules of constitutional law that were previously unavailable.

First, the *Lawrence* Court held that "[t]he State cannot demean [the existence of consenting adults of the same sex who had sex with one another] or

control their destiny by making their private sexual conduct a crime." *Id.* at 578. The Court thus placed that private conduct beyond the law's power to punish. *Lawrence* created a new substantive rule that undoubtedly has retroactive effect. *See, e.g.*, *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) ("*Lawrence* is a new substantive rule and is thus retroactive."); *see also In re Franks*, 815 F.3d 1281, 1285 (11th Cir. 2016) (observing that "we apply retroactively on collateral review rules that render inviolate 'certain kinds of primary, private individual conduct,'" such as *Lawrence*'s rule) (citation omitted); *abrogated on other grounds*, *Welch v. United States*, 136 S.Ct. 1257 (2016); *In re Rivero*, 797 F.3d 986, 988 (11th Cir. 2015) (same).

Lawrence also followed the Court's decision to "invalidate[] an amendment to [a State] Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by 'orientation, conduct, practices or relationships.'" *Id.* at 574 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)). The *Romer* Court homed in on the likelihood that the amendment was "inexplicable by anything but *animus* toward the class it affects." *Romer*, 517 U.S. at 632 (emphasis added).

Mr. Rhines "relies on" *Lawrence* and *Romer*. These cases stand for the proposition that no individual should face criminal consequences or animus from a state actor—here, sentencing jurors—on the basis of an immutable characteristic like sexual orientation. That proposition applies to Mr. Rhines's claims.

The previous unavailability of *Lawrence* and *Romer* to Mr. Rhines can and should inform this Court's decision to order a hearing here. Until Mr. Rhines had received the benefit of (i) jurors' statements reflecting stereotypes and animus directed at his sexual orientation and (ii) this Court's holding in *Pena-Rodriguez*, his claims of Sixth, Eighth, and Fourteenth Amendment violations during his capital sentencing had no "possibility of merit to [have been] considered available." *See Cathey*, 857 F.3d at 232. Before the State carries out Mr. Rhines's execution, this Court should recognize that he is entitled to the opportunity to have a court hear his evidence and address the merits of his claims.

Section 2244(b) should pose no barrier to this Court's review of this petition for a writ of habeas corpus.

IV. Mr. Rhines is entitled to a hearing.

Mr. Rhines can demonstrate his entitlement to an evidentiary hearing. He did not "fail[] to develop the factual basis of [any sentencing juror bias claim]," § 2254(e)(2), because there was no "lack of diligence, or some greater fault, attributable to [him] or [his] counsel," *Williams v. Taylor*, 529 U.S. 420, 435 (2000). Until *Pena-Rodriguez* and federal habeas counsel interviewed the sentencing jurors, the claims now presented to this Court were not "available" to Mr. Rhines. *See supra* Section III.B.

No aspect of the South Dakota Supreme Court's two-page order interpreting *Pena-Rodriguez* and declining to apply it to Mr. Rhines's case deserves deference.

That ruling, however, did not adjudicate any claim of a Sixth, Eighth, or Fourteenth Amendment violation in permitting the execution of Mr. Rhines to go forward. That ruling also rested on factual determinations that are both unreasonable and contradicted by Mr. Rhines's clear and convincing evidence of at least one juror's prejudice. The evidence Mr. Rhines has submitted to the courts includes "clear statement[s]" that "exhibit[] overt . . . bias" and "tend to show that [anti-gay] animus was a significant motivating factor" in at least one "juror's vote" to sentence Mr. Rhines to death. *See Pena-Rodriguez*, 137 S. Ct. at 869. No juror has retracted them. Moreover, the state court reached its factual determination without any hearing that might have provided information regarding jurors' credibility or resolved any factual disputes. *See Wellons v. Hall*, 558 U.S. 220, 221 (2010); *Murphy v. Florida*, 421 U.S. 794, 800-03 (1975); *Smith v. Phillips*, 455 U.S. 209, 215 (1982). The state court's order should pose no barrier to this Court's review.

V. To permit the State to execute Mr. Rhines without any court having held an evidentiary hearing on the sentencing jurors' statements would raise serious constitutional concerns.

The Sixth, Eighth, and Fourteenth Amendments forbid carrying out a death sentence that is based on a defendant's immutable characteristic and constitutionally protected conduct. This Court should order a hearing to avoid such a constitionally intolerable event. And procedural rules should give way to avoid this type of "miscarriage of justice." *Cf. Waldrop v. Comm'r, Alabama Dep't of Corr.*, 711 F. App'x 900, 925 (11th Cir. 2017) (unpublished) (Martin, J., concurring in

judgment) ("But I am at a loss to otherwise explain how a person being sentenced to death based on his race could be anything other than a fundamental miscarriage of justice.").

The execution of a man whose sentencers based their decision on his sexual orientation and anti-gay stereotypes "would be a constitutionally intolerable event." *See Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) (citations and some quotation marks omitted). To date, this Court has looked to Judge Friendly's emphasis on actual innocence and limited the "miscarriage of justice" exception for successive claims, or second-in-time petitions with new claims, to focus on issues of "actual innocence." *See Sawyer v. Whitley*, 505 U.S. 333, 338–41 (1992). In spite of that precedent, "Judge Friendly [also] emphasized [that] there are contexts in which, irrespective of guilt or innocence, constitutional errors violate fundamental fairness. Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence. ¶ Nowhere is this more true than in capital sentencing proceedings." *Sawyer*, 505 U.S. at 361(Stevens, J., concurring in judgment) (citing Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151–54 (1970)); *see* Friendly, 38 U. Chi. L. Rev. at 142 (recognizing "a few important exceptions" to the focus on "a colorable claim of innocence"). "The Court would do well to heed Justice Black's admonition: '[I]t is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution.'" *Sawyer*, 505 U.S. at 357 (1992) (Blackmun, J., concurring in

judgment) (quoting *Brown v. Allen*, 344 U.S. 443, 554 (1953) (Black, J., dissenting) (footnote omitted).

It remains true in this case that "a single general directive animates and informs [the Court's capital-punishment jurisprudence: '[T]he death penalty [may not] be imposed under sentencing procedures that creat[e] a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner.'" *Sawyer*, 505 U.S. at 367 (Stevens, J., concurring in judgment) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

In turn, this Court should recognize that denying a petitioner a meaningful opportunity to develop evidence that his death sentence was based on his sexual orientation—an immutable characteristic—and sentencers' pernicious stereotypes about both the man and the characteristic would constitute an equally fundamental miscarriage of justice.

The Court long has recognized the "special context of capital sentencing." *Lockhart v. McCree*, 476 U.S. 162, 182–83 (1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519, 520–21 (1968), and *Adams v. Texas*, 448 U.S. 38, 46, 50 (1980)). Inherent in this "special context" is that states have given juries "broad discretion to decide whether or not death *is* 'the proper penalty' in a given case, ..." *Id.* (quoting *Witherspoon*, 391 U.S. at 519). To look away from evidence that jurors invoked deeply rooted and socially harmful prejudice in exercising that discretion risks a "systemic loss of confidence" in capital jury sentencing. *See Pena-Rodriguez*, 137 S. Ct. at 869.

Just as the Court considered Fourteenth Amendment principles in *Pena-Rodriguez*, 137 S. Ct. at 867–68, this Court should consider the "'recogni[tion] that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination,'" *Turner*, 476 U.S. at 35 (plurality opinion) (quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

Mr. Rhines faces the "qualitative[ly] differen[t] sentence" of death, but no court has held a hearing to judge the invocation of a stereotype and expression of animus in sentencing him to death. Unless this Court acts now, no court ever will.

CONCLUSION

For the reasons discussed above, this Court should grant the petition for a writ of habeas corpus.

Respectfully submitted,

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